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GUYANG & ORS v. JABATAN HUTAN SARAWAK

HIGH COURT SABAH & SARAWAK, SIBU
LIM HOCK LENG JC
[CRIMINAL APPEAL NO: SBW-42H-4-4-2018]
6 SEPTEMBER 2018

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CIVIL PROCEDURE: *Appeal – Appeal from Sessions Court – Charges under s. 96(1) of Forests Ordinance 2015 (Cap 71) – Sessions Court imposed term of imprisonment in default of payment of fine – Whether s. 96(3) provides for custodial sentence – Whether order for payment of money to Government is order 'made in a civil proceeding' – Whether order of imprisonment should stand*

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CIVIL PROCEDURE: *Appeal – Appeal from Sessions Court – Revisionary powers of court – Whether could be exercised even though there is appeal – Whether purpose and scope of appeal and process of revision are different – Whether sentence set aside in exercise of court's revisionary powers*

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The four appellants were jointly charged in the Sessions Court for an offence under s. 96(1) of the Forests Ordinance 2015 (Cap 71) ('the Ordinance'), punishable under s. 96(1) and 96(3) of the same Ordinance. Upon plea of guilty, pursuant to s. 96(1) of the Ordinance, all the appellants were fined

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RM25,000 each and in default of payment, a term of imprisonment for ten months. None of the appellants paid the fine and served the sentence. The Sessions Court then proceeded to order each of the appellants to pay a penalty of RM437,935.20, failing which they would be subject to a further term of imprisonment of ten months, purportedly pursuant to s. 96(3) of the

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Ordinance. Hence, the appellants appealed. The appellants also applied to the court to exercise its powers of revision on the basis that: (i) the charge and the consequences of their pleas were not explained to or understood by the appellants; and (ii) the appellants had been wrongly punished twice for the same offence.

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Held (dismissing appeal; varying sentence in part):

(1) An appellate court deals with questions of law and/or fact in relation to findings and decisions. By contrast, 'revision ought not to be granted where there was a mere difference in the view of the law, as that lay in the province of the appellate process.' (*Ang PohChuan v. PP*). The court

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can exercise its revisionary powers even though there is an appeal at the same time, as the purpose and scope of an appeal and the process of revision are different. The appellant/applicant for revision need not abandon one or the other unless the grounds are the same or overlap. (paras 11-12)

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(2) The Sessions Court took pains to satisfy itself that the appellants understood the punishment which could be meted out under s. 96(1) and s. 93(3) of the Ordinance. The punishment following a conviction for an

offence under s. 96(1) is set out therein as well as under s. 96(3). Section 96(3) prescribes minimum penalty of ten times the value of the forest produce. It provides a consequential or additional order which may be made upon the conviction of the appellants, on top of the fine and/or terms of imprisonment which may be meted out under s. 96(1). Hence, the contention that the appellants had been wrongly punished twice for the same offence was not entirely accurate. (paras 15, 16 & 18)

(3) There is no provision for a custodial sentence within s. 96(3) of the Ordinance. The default in payment of the penalty under s. 96(3) does not lead to a term of imprisonment, which the Sessions Court had erroneously imposed. The section treats any order made thereunder for payment of money to the Government as an order 'made in a civil proceeding'. Given the specific wording of s. 96(3), an order of imprisonment in default of payment should not be allowed to stand. (paras 20 & 24)

(4) The decision of the Sessions Court that each of the appellants be fined RM25,000, in default of payment, imprisonment for ten months, and the minimal penalty of RM437,935.20 was maintained. The further term of imprisonment for ten months, in the event of default in payment of the penalty was set aside in the exercise of the court's revisionary powers. The forfeiture orders and the order that the fourth appellant, a foreigner, to be referred to the Immigration Department after serving sentence, were maintained. (para 25)

Case(s) referred to:

Ang Poh Chuan v. PP [1996] 1 SLR 326 ***(refd)***
Manokaran & Anor v. PP [1978] 1 LNS 118 HC ***(refd)***
Mohammad Hassan v. PP [1997] 1 CLJ Supp 485 HC ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
PP v. Kulasingam [1974] 1 LNS 118 HC ***(refd)***
PP v. Rozita Mohamad Ali [2018] 9 CLJ 265 HC ***(refd)***
R v. Marlow (Bucks) Justices, Ex parte Schiller [1957] 2 All ER 783 ***(dist)***
Yakman Mohamed Tahir & Anor v. Public Prosecutor of Johore [1949] 1 LNS 105 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 432
Forests Ordinance 2015 (Sarawak)(Cap 71), ss. 2, 96(1), (3)

Magistrates' Court Act 1952 [UK], s. 64(3), Schedule 3 para 4

For the appellants - Jessie Wong; M/s Nawi Wong & Partners
For the defendant - Joseph Chioh; Senior State Legal Counsel, Sarawak

Reported by S Barathi

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JUDGMENT

Lim Hock Leng JC:

[1] The four appellants were jointly charged in the Sessions Court in Sarikei. The charge reads:

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> That you with the three others jointly on the 4th day of March 2018 at about 1815 hours at Muara Batang Rejang, Tanjung Manis, in the District of Tanjung Manis in the State of Sarawak, did aboard a vessel registered as Hock lng Hiing (permanent number QSB 3475K) containing a red/ orange crane (Hitachi), were found to be in unlawful possession of forest produce amounting *to wit* 298 pieces of logs @ 109.483m3 all of which do not bear any registered property mark thereof, and you have thereby committed an offence under Section 96(1) of Forests Ordinance 2015 (Chapter 71) and punishable under Section 96(1) and 96(3) of the same.

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[2] On 26 March 2018, the fourth appellant pleaded guilty. Pursuant to s. 96(1) of the Forests Ordinance 2015, he was fined RM25,000 and in default of payment, a term of imprisonment for ten months would have to be served.

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[3] The case was then adjourned for further mention with the three others jointly charged.

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[4] On 16 April 2018, the first, second and third appellants also pleaded guilty and were similarly fined RM25,000 and in default of payment, a term of imprisonment for ten months under s. 96(1) which provides:

> Any person found in unlawful possession of any forest produce shall be guilty of an offence and shall, upon conviction, be punished with a fine of not less than twenty-five thousand ringgit and not exceeding one hundred and fifty thousand ringgit or imprisonment not exceeding five years or to both, and for a subsequent offence, shall be punished with a fine of not less than one hundred and fifty thousand ringgit and not exceeding five hundred thousand ringgit or imprisonment not exceeding ten years or to both.

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[5] None of the appellants paid the fine. They are presently serving sentence.

[6] The Sessions Court then proceeded to order each of the appellants to pay a penalty of RM437,935.20, failing which they would be subject to a further term of imprisonment for ten months, purportedly pursuant to s. 96(3) which provides:

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> When a person is convicted of an offence under this section, the court shall, in addition to any penalty which it may impose, order the person convicted of the offence to pay to the Government a sum of not less than ten times the value (as assessed by the Director or any forest office authorised by him) of the forest produce in respect of which the offence has been committed, and any sum ordered to be so paid shall be recoverable by the Government as a civil debt.

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[7] Apart from the appeal, the appellants also applied to this court to exercise its powers of revision on the basis that: A

(a) the charge and the consequences of their plea were not explained to or understood by the appellants; and

(b) the appellants had been wrongly punished twice for the same offence. B

[8] Learned counsel for the respondent argues that the appellants should be put to election as to whether they wish to pursue the appeal or the application for this court to exercise its powers of revision.

[9] Reference was made to *PP v. Rozita Mohamad Ali* [2018] 9 CLJ 265; [2018] 9 MLJ 1 where the High Court held that "the prosecution must choose to proceed with the appeal or revision if both matters are before the court" and noted that it could not find any judicial pronouncement that once a notice of appeal is filed, an application for revision cannot be done. C

[10] The basis upon which an appeal is heard and disposed of is different from that by which a court exercises its revisionary powers, though there may, in certain cases, be an overlap in the process. These avenues generally cater for the resolution of grievances from the subordinate courts in different ways. D

[11] It may be said that an appellate court deals with questions of law and/or fact in relation to findings and decisions. By contrast, "revision ought not to be granted where there was a mere difference in the view of the law, as that lay in the province of the appellate process", as was held by the High Court in Singapore in *Ang Poh Chuan v. PP* [1996] 1 SLR 326. On the powers of revision, in *PP v. Kulasingam* [1974] 1 LNS 118, Hashim Yeop Sani J (as he then was) held: E F

> The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to sub-sections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of paternal or supervisory jurisdiction in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice. G

[12] The court accepts the submission of learned counsel for the appellants that it can exercise its revisionary powers even though there is an appeal at the same time, as the purpose and scope of an appeal and the process of revision are different. The appellant/applicant for revision need not abandon one or the other unless the grounds are the same or overlap. H

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[13] In holding that an application for revision can be dealt with while an appeal is pending or called up at the same time, reference is made to *Mohammad Hassan v. PP* [1997] 1 CLJ (Supp) 485; [1997] 1 BLJ 485; [1985] 5 MLJ 65 where Augustine Paul JC (as he was then) held:

> Section 305 of the CPC provides that a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. Once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the court hearing the appeal to act in revision. The court is entitled to and will, where appropriate, act in revision and set aside a conviction (see p. 75E-F); *Lee Yu Fah & Ors v. PP* [1937] MLJ 179, *Mohd Dalhar Bin Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209; [1995] 1 MLJ 645 and *PP v. Mohamed Tarmizi* [1985] 1 MLJ 219 followed.

[14] In *Manokaran & Anor v. PP* [1978] 1 LNS 118; [1979] 1 MLJ 262, Abdoolcader J held:

> I have however not only extensive powers of revision in criminal proceedings under the provisions of s. 325 of the Criminal Procedure Code but even wider powers conferred by s. 35 of the Courts of Judicature Act 1964, and the deputy public prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. I would merely add that in my view notwithstanding the provisions of s. 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity. It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to counsel on both sides at the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors* [1934] 62 IA 36 to the effect that when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by another provision in the Criminal Procedure Code from doing so in the appeal.

[15] Returning to the mainstream narrative on the appellants' complaint that the charge was not explained to or understood by them, the notes of proceedings however tell a different story. As pointed out and highlighted by learned counsel for the respondent, the Sessions Court took pains to satisfy itself that the appellants understood the punishment which could be meted out under s. 96(1) as well as s. 96(3) of the Forests Ordinance 2015.

[16] There is also a preliminary objection raised in respect of the appeal, *viz*, as to the party named as the respondent. It is argued that the parties in the Sessions Court were the Public Prosecutor and Guyang & Ors, and not

Jabatan Hutan Sarawak and Guyang & Ors. In arguing that the appeal ought to be struck out, a passage in *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209; [1995] 1 MLJ 645, p. 221 (CLJ); p. 658 (MLJ) was cited:

> Before I conclude, there is one other matter that I ought to have brought to the attention of counsel during argument. It has to do with the citation of the Datuk Bandar as the respondent to the motion. The proper respondent to all criminal proceedings before the High Court and this court is the Public Prosecutor and not the particular complainant in criminal proceedings commenced by the issue of summons. This is for the reason that it is the Public Prosecutor who has the sole control over all criminal proceedings of whatever nature and by whomsoever commenced.

[17] The preliminary objection is sustained. The appeal is dismissed. That is however not the end of the matter. There is still the alternative recourse to the revisionary powers of the court, so that the decision of the Sessions Court may be revisited to ascertain whether there has been a miscarriage of justice.

[18] The contention that the appellants had been wrongly punished twice for the same offence is not entirely accurate, as the punishment following a conviction for an offence under s. 96(1) is set out therein as well as under s. 96(3). The punishment is set out under two sub-sections, instead of the usual situation where the punishment is set out in one particular provision.

[19] Section 96(3) prescribes a minimum penalty of ten times the value of the forest produce. It provides, what the learned counsel for the respondent describes as, a consequential or additional order which may be made upon the conviction of the appellants, on top of the fine and/or term of imprisonment which may be meted out under s. 96(1). That would be the true construction of s. 96(1) read together with s. 96(3).

[20] However, default in payment of the penalty under s. 96(3) does not lead to a term of imprisonment, which is what the Sessions Court had erroneously imposed. There is no provision for a custodial sentence within s. 96(3), for the penalty imposed is expressly stated to be "recoverable by the Government as a civil debt." Indeed, s. 96(3) treats any order for payment to the Government as an order made in a civil proceeding. See also *Yakman Mohamed Tahir & Anor v. Public Prosecutor of Johore* [1949] 1 LNS 105; [1940] 9 MLJ 196 (JR).

[21] It is to be noted that "civil debt" is defined under s. 2 of the Forests Ordinance 2015 as "any order made by the court under this Ordinance for the payment of money to the Government and shall be deemed to have been made in a civil proceeding for the purposes of the Government Proceedings Act 1956 [Act 359] and the Rules of Court 2012 [P.U.(A) 205/2012]".

[22] While s. 432 of the Criminal Procedure Code provides that where any person is ordered to pay any sum of money by way of costs or compensation, the court may direct that in default of payment, the person shall suffer imprisonment for a certain term, the provision is inapplicable.

[23] The English case of *R v. Marlow (Bucks) Justices, Ex parte Schiller* [1957] 2 All ER 783 is to be distinguished. There, the applicant for an order of *certiorari* failed to pay contributions under the National Insurance Act 1946. He was fined and also ordered to pay arrears of contributions. He did not comply. The justices committed him to prison for three months, although by virtue of para. 4 of Schedule 3 to and s. 64(3) of the Magistrates' Court Act 1952, the maximum period of imprisonment for a sum "enforceable as a civil debt" was six weeks. Paragraph 4 states that "(t)he maximum period applicable to a sum of any amount enforceable as a civil debt shall be six weeks." In that case, reg. 19(5) of the Regulations of 1948 made the arrears recoverable as a penalty. The court held that once the sum was recoverable as a penalty, it was no longer a sum "enforceable as a civil debt".

[24] The nature of enforcement of the order as envisaged by reg. 19(5) in that case is by way of a default custodial provision, whereas s. 96(3) of the Forests Ordinance 2015 treats any order made thereunder for payment of money to the Government as an order "made in a civil proceeding". Given the specific wording of s. 96(3), an order of imprisonment in default of payment should not be allowed to stand.

[25] The decision of the Sessions Court that each of the appellants be fined RM25,000, in default of payment, imprisonment for ten months and the minimal penalty of RM437,935.20 is maintained; while the further term of imprisonment for ten months, in the event of default in payment of the penalty, is set aside, in the exercise of this court's revisionary powers. The forfeiture orders are maintained, as is the order that the fourth appellant, who is a foreigner, is to be referred to the Immigration Department after serving sentence.